KHOR KIM YONG

v.

PUBLIC BANK BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[ORIGINATING SUMMONS NO: S2-24-1017-1994]
1 OCTOBER 1997

LAND LAW: *Charge - Order for sale - Service of - Duty of registrar to serve on chargor - Duty of chargee - Effect of failure to make service - Whether order for sale void - National Land Code 1965, s. 258(1)(a)*

LAND LAW: *Charge - Order for sale - Service of - Whether draft copy of order sufficient - Draft copy unsigned - Effect of*

LAND LAW: *Charge - Order for sale - Summons for directions - Failure to serve summons on chargor - Effect of - Whether order for sale void - Audi alteram partem*

LAND LAW: *Sale of land - Auction - Failure to inform chargor of auction date - Effect of - Payment by chargor on auction date - Whether valid*

The plaintiff had charged his property to the 1st defendant. Based on the said charge, the 1st defendant had obtained an order for sale of the said property from the High Court. Subsequently, the plaintiff became aware of the fact that the said property had been auctioned off and purchased by the 2nd defendant, a *bona fide* purchaser for value at the auction. The plaintiff now challenged the sale by auction on the basis that the following defects and non-compliance of the rules and laws by the 1st defendant had occurred in the process of auctioning off the said property: (i) the failure by the 1st defendant to serve the order for sale on the plaintiff; (ii) the failure by the 1st defendant to inform the plaintiff of the adjourned date for the hearing of the summons for directions; (iii) the failure of the 1st defendant to serve the valuation report on the plaintiff; (iv) the failure of the 1st defendant to inform the plaintiff of the auction dates; and (v) the failure of the 1st defendant to file a second summons for directions to refix the auction date after the original date was taken off by the court.

The plaintiff prayed for a declaration that the sale of the said property was null and void and be set aside, damages in lieu of specific performance together with interest thereon and that the 1st defendant be ordered to pay the costs of the auction and other costs arising therefrom.

Held:

[1] It is settled law that courts have continuously set aside judgments or orders or proceedings which are vitiated by the breach of rules and/or laws on the ground of nullity. The aggrieved party has the right *ex debito justitiae* to set aside such a judgment or order or proceeding.

[2] In view of s. 258(1)(a) of the National Land Code 1965 ('the NLC') it is a compulsory duty of the registrar to serve a copy of the order for sale on the chargor prior to the sale of the property. Even though this compulsory duty was the burden of the registrar, it was at the 1st defendant's instance that the order for sale was made and hence this burden must equally be shared by the 1st defendant (chargee) who ought to have ensured that this statutory requirement had been complied with prior to the sale in order to avoid having the sale declared void and illegal.

[3] The 1st defendant had not in any of its affidavits in reply denied the allegation of failure to serve the order for sale. It is trite law that the failure to deny a positive averment in an affidavit by way of a reply to that affidavit is deemed to be an acceptance of the facts asserted therein. Further, there was no affidavit of service affirmed and filed by or on behalf of the registrar of the High Court to show that the order for sale had in fact been served on the plaintiff. By implication, the registrar had indeed failed to comply with the strict requirement of s. 258(1) of the NLC.

[4] The receipt of the draft copy of the order for sale by the plaintiff's solicitors was not sufficient compliance by the 1st defendant of the requirements of s. 258(1) of the NLC because the draft was neither signed by the plaintiff's solicitors, nor the defendant's solicitors nor the registrar. This unsigned draft, therefore, could not fall within the accepted principle of an order within s. 258(1) of the NLC.

[5] It was fundamental that the summons for directions had to be served and the plaintiff be notified of the date of the hearing to allow him an equal opportunity to be present at the hearing either to challenge and/or adduce evidence especially with regard to the reserve price of the property to ensure that there would be no shortfall owed to the chargee (the 1st defendant) and that even if there was any, that it be kept to a minimum.

[6] There was no proof of service on the plaintiff of the adjourned date of hearing of the summons for directions and therefore the plaintiff had made out a case for the nullification of the auction and a declaration to that effect as prayed for. The fact that there had been a delay of 2½ years

before the plaintiff complained about this impropriety did not take the sting off this impropriety. The order for sale was void the moment it was obtained, the defence of delay was a *non sequitur*.

[7] Relying on *Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* and applying the *audi alteram partem* rule, the plaintiff should have been served with all the necessary documentary evidence on which the 1st defendant had relied so as to give the plaintiff an opportunity to assess the basis of the valuation of the said property and to challenge it if need be at the hearing of the summons for directions.

[8] It is the fundamental right of a chargor to tender payment on the date of the auction as pronounced in the case of *M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor.* The failure to inform the chargor of the auction date is a fundamental breach of an obligation under the NLC. This in consequence, renders the auction liable to be set aside on the ground that the order for sale is a nullity. However, in the present case, the 1st defendant had advertised in "The Star" newspaper the date of the auction and this constituted sufficient notice to the plaintiff.

[9] The order for sale would require the filing of a further summons for directions to re-fix the auction date only if the auction was aborted. It was clear that in the present case the court had on its own volition, even before the scheduled auction date, postponed the auction to another date by way of a letter. There was no breach of the order for sale as there was no abortion of the sale.

[Order accordingly.]

Cases referred to:

Chief Kofi Forfie v. Barima Kwabena Seifah [1958] 1 All ER 289 ***(refd)***

Craig v. Kanseen [1943] 1 All ER 108 ***(refd)***

Muniandy a/l Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 1 AMR 908 ***(refd)***

M & J Frozen Food Sdn Bhd & Anor. v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(refd)***

Ng Hee Thong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(cit)***

Legislation referred to:

National Land Code 1965, ss. 258(1)(a), 340(2)(b)

Rules of the High Court 1980, O. 83 r. 2(4)

For the plaintiff - Mohamed Haniff Khatri Abdulla; M/s Haniff & Rajendran

For the defendants - Paul Kwong; M/s Azman, Davidson & Co

JUDGMENT

RK Nathan JC

Facts

This action is only against the 1st defendant chargee. The case against the 2nd defendant, a *bona fide* purchaser for value of the property at the auction, was withdrawn. The plaintiff had charged a property known as H.S.(D) 27857, P.T. 16698, Mukim Petaling (the property) to the 1st defendant. Based on the said charge the 1st defendant had filed a charge action to obtain an order for sale by way of Kuala Lumpur High Court Originating Summons No. S6-31-2645-88 (the OS action), and obtained the said order on 2 March 1992. In February 1993 the plaintiff became aware of the fact that the property had been auctioned off and purchased by the 2nd defendant for RM401,000. The plaintiff now challenges that sale by auction on the basis that there has been various defects and non-compliances of the rules and laws by the 1st defendant in the process of auctioning off of the property.

The Cause Of Action

The plaintiff therefore prayed for:

(a) A declaration to be issued by this Honourable Court that the sale of the property better known as H.S.(D) 27857, P.T. 16698, Mukim Petaling, by way of public auction on 1 September 1992 or any other date fixed thereafter is null and void and be set aside on the ground that the said sale was in breach of the procedures fixed by the law, rules and inherent jurisdiction of the court.

(b) That damages in lieu of specific performance be paid by the 1st defendant to the plaintiff, together with interest at the rate of 4% per annum on the aforestated amount from the date of the auction until the date of this matter and thereafter interest at the rate of 8% until the date of full settlement, and that such damages be assessed by the Deputy Registrar and that parties be given liberty to adduce evidence either by way of affidavits or orally.

(c) That the 1st defendant pays the costs of the auction and costs arising therefrom to the plaintiff.

Court's Jurisdiction To Set Aside Judgments Or Orders

It is settled law that courts have continuously set aside judgments or orders or proceedings which are vitiated by breach of rules and/or laws on grounds of nullity. The aggrieved party has the right *ex debito justitiae* to set aside such a judgment or order or proceeding. This was pronounced in *Craig v. Kanseen* [1943] 1 All ER 108 at 113 by Lord Greene MR when he said:

> Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled e*x debito justitiae* to have set aside.

This celebrated pronouncement has been accepted throughout the Commonwealth jurisdiction, and one example of same appears in the Privy Council decision which was an appeal from West Africa in *Chief Kofi Forfie v. Barima Kwabena Seifah* [1958] 1 All ER 289 wherein at p. 290 Mr. L.N.D. de Silva, delivering the judgment of the Board said:

> ... A court had inherent power to set aside a judgment which it had delivered without jurisdiction. Lord Greene, MR, in *Craig v. Kanseen* ([1943] 1 All ER 108 at p. 113), after referring to several decision, had said:
>
> > Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary.
>
> Their Lordships were of the same opinion.

I was invited to consider various issues as constituting breaches of rules and laws committed by the plaintiff in respect of the sale of the said property.

The Failure To Serve The Order For Sale Dated 2 March 1992

The plaintiff argued that he was not served with a copy of this order for sale and maintained that this was fatal. With regard to the failure of the 1st defendant to serve the sealed copy of the order for sale dated 2 March 1992 the provisions of the National Land Code 1965 (NLC) has to be referred to. Section 258(1)(a) of the NLC reads:

> (1) Where any such order has been made, it shall be the duty of the registrar of the court:
>
> (a) to serve a copy thereof on the chargor, and on every chargee of the land or lease in question;

In the circumstances it is a compulsory duty of the registrar to serve a copy thereof on the chargor prior to the sale of the property. Even though this compulsory duty becomes the burden of the registrar, it is without doubt that it was at the 1st defendant's instance that the order for sale was made and hence this burden must equally be shared by the 1st defendant (chargee) who ought to ensure that this statutory requirement had been complied with prior to the sale. It is a burden that ought to be willingly undertaken by the chargee if he wishes to avoid the pain of having the sale declared void or illegal. Despite the fact that the said allegation of failure to serve the order for sale dated 2 March 1992 was raised by the plaintiff in his affidavit the 1st defendant has not, in any of the two affidavits in reply, denied this allegation. It is trite law that failure to deny a positive averment in any affidavit by way of a reply to that affidavit, is deemed to be an acceptance of the fact asserted to therein (see *Ng Hee Thong & Anor v. Public Bank Bhd* [1995] 2 AMR 622). In fact by way of encl. 4A, which is an affidavit affirmed by an officer of the 1st defendant, the 1st defendant had annexed as exh. CKK14, a copy of the sealed order for sale dated 2 March 1992, but there is no proof of service of the said order whereas in the same affidavit the 1st defendant had annexed proof of service of various other cause papers, namely CKK15 being proof of service of summons for directions dated 19 May 1995, exhs. CKK11 and CKK12 as proof of service of the draft order for sale dated 2 March 1992 and exhs. CKK17 and CKK18 as proof of service of the draft order dated 25 May 1992 pursuant to the summons for directions. Further I find that there is no affidavit of service affirmed and filed by or on behalf of the registrar of the High Court to show that the order for sale had in fact been served on the plaintiff. I therefore must hold by implication that the registrar concerned had indeed failed to comply with the strict requirement of s. 258(1) of the NLC. The 1st defendant's argument that receipt of the draft copy of the order for sale dated 2 March 1992 by the plaintiff's previous solicitors is sufficient compliance of s. 258(1)(a) of the NLC, is unacceptable because the draft was neither signed by the plaintiff's solicitors, nor the defendant's solicitors nor the registrar. By no stretch of the imagination can this unsigned draft fall within the accepted principle of an order as falling within s. 258(1) of the NLC. On this ground, I rule for the plaintiff.

Failure Of 1st Defendant To Inform Plaintiff Of The Adjourned Summons For Directions

The plaintiff also contended that the failure of the 1st defendant to inform the plaintiff as to the adjourned date for the hearing of the summons for directions dated 19 May 1992 to 15 June 1992 has also amounted to a breach of a requirement which nullifies the whole process subsequent to the same, and inclusive of the auction which took place on 18 September 1992. The

plaintiff had by way of encl. 2 unreservedly averred that he had not been informed as to the dates for the hearing of the summons for directions dated 19 May 1992 and especially the adjourned date of 15 June 1992 on which date the learned Senior Assistant Registrar had in fact given the order in terms of the 1st defendant's summons for directions. None of the exhibits offered by the 1st defendant in its affidavits show that the hearing date of 15 June 1992 had been communicated to the plaintiff and/or to his previous solicitors. Exhibit CKK15 only shows that the first date of hearing, that is 29 May 1992 was notified to the plaintiff. However, that was not the date when the order was granted. Exhibit CKK16 shows clearly that the hearing date was adjourned from 29 May 1992 to 8 June 1992. This letter was addressed to the plaintiff's former solicitors. Yet no proof of posting is annexed to exh. CKK16. In any event 8 June 1992 was not the date when the order was obtained. It was on 15 June 1992 and no evidence has been shown if the plaintiff was notified of this hearing date. It is fundamental that the summons for directions has to be served and the plaintiff be also notified of the date of the hearing to allow him an equal opportunity to be present at the hearing so that he could either challenge and/or adduce evidence especially with regard to the reserve price of the property which would go towards ensuring that there is no shortfall owed to the chargee (the 1st defendant) and that even if there is any, that it is kept to a minimum. In *Muniandy a/l Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 1 AMR 908 the Federal Court faced with a similar situation said in the judgment of Edgar Joseph Jr FCJ at p. 918:

> In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the *ex parte* orders obtained, in consequence, a nullity.

In consequence thereof the Federal Court set aside the sale to the purchaser and cancelled the registration as having been obtained by an instrument, to wit, the certificate of sale, which was null and void within the meaning of s. 340(2)(b) of the NLC. There was also an order for the refund of the purchase price to the purchaser. In deciding on this issue the Federal Court approached the problem with a dual-pronged attack. Firstly his Lordship invoked O. 83 r. 2(4) of the Rules of the High Court 1980 (the RHC) and concluded that the said rule required the service of all notices of adjourned hearings of the originating summons on the chargors. Secondly he applied the natural justice point of audi alteram partem. He said at p. 917:

> ... It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem*. It was said by Fortescue J in *R v. Chancellor of*

Cambridge University [1723] 1 Stra 557 where Dr Bentley had been deprived of his academic degrees by decree that the principle goes back to the Garden of Eden. This is how his Lordship put it:

> The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called on to make his defence. "Adam" (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also.

In fact his Lordship was ever vigilant in differentiating the need for "service" of the adjourned date of hearing with that of a mere "sending" of the same in *Muniandy's* case. He said at p. 918:

> ... Indeed, there was no proof of posting of this notice, and even if there had been, this even if accompanied by the fact that it was not returned, would not have sufficed as proof of service, in the absence of a deeming clause in the contract of loan or the annexure to the charge, bearing in mind especially the denial on oath by the chargors of receipt of the notice of the adjourned date of hearing.

Applying the same analogy to the facts of the case before me I am satisfied that there is no proof of service on the plaintiff of the adjourned date of hearing of the summons for directions. Therefore even on this issue I find that the plaintiff had made out a case for the nullification of the auction and a declaration to that effect, as prayed for.

The 1st defendant's argument that only after 2½ years (the 1st defendant having filed its originating summons on 14 December 1992) that the present plaintiff is complaining of this alleged impropriety, and that too without giving any reasons for the inordinate delay, cannot in any way take the sting off this impropriety. The order was void the moment it was obtained. The defence of delay is a *non sequitur*. The 1st defendant also argued that the plaintiff had waived his rights by his conduct. Learned counsel for the 1st defendant attempted to distinguish *Muniandy's* case by arguing that it was a case dealing with the question as to whether an order for sale ought to be set aside. I fail to see if there is any difference in the order prayed for here under prayer (a) which was for a declaration that the said auction sale be declared null and void and be set aside on the ground that the said sale was in breach of the procedures fixed by the law, with the order granted in the *Muniandy's* case which was also to set aside the order for sale.

Failure Of The 1st Defendant To Serve The Valuation Report

The plaintiff raised a further issue, which was the failure of the 1st defendant to serve the affidavit of the 1st defendant dated 3 June 1992 filed in support of the summons for directions in which was exhibited the valuation report dated 3 June 1992, thus denying the plaintiff the opportunity of disputing the reserve price of RM400,000. The 1st defendant had through its solicitor, Mr. Paul K.W. Kwong, affirmed an affidavit on 30 May 1995 (encl. 5) stating that the affidavit dated 3 June 1992 containing the said valuation report of the said property was indeed filed in court prior to the order for sale dated 15 June 1992 pursuant to the summons for directions dated 19 May 1992. However the 1st defendant has not, I find, denied its failure to serve the same on the plaintiff. Again relying on *Muniandy's* case and applying the *audi alteram partem* rule it is my judgment that the plaintiff should have been served with all necessary documentary evidence on which the 1st defendant had relied on so as to give the plaintiff an opportunity to assess the basis of the said valuation and to challenge it if need be, at the hearing of the summons for directions. On this ground too, I find for the plaintiff.

Failure Of 1st Defendant To Inform Plaintiff Of The Auction Dates

The plaintiff raised a further issue that the 1st defendant had failed to notify the plaintiff as to any of the dates of auction of the said property either on 1 September 1992 or the subsequent date on 18 September 1992 when the auction actually took place and resulting in the 2nd defendant purchasing the said property.

In *M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 1 MLJ 119 Wan Yahya SCJ clearly stated the position of the chargor and chargee in respect of a sale by auction. He said at p. 308:

> The chargor does not abrogate all his rights to the chargee at the making of the order for sale. He is merely compelled to abide by the court's order for his property to be sold in accordance with the statutory safeguards on his interest as provided under ss. 257 and 258 of the NLC. ... Even after the order of sale has been made and when the auction sale is already in progress, but before a bid has been accepted, he still retains the right to tender payment of the amount which he owes the chargee (which may be less than the value of the land on sale) and call off the sale – s. 266 of the NLC.

In fact it is this fundamental right of the plaintiff to tender payment on the date of the auction as pronounced in *M&J Frozen Food* that renders a failure to inform the chargor of the auction date a fundamental breach of an obligation under the NLC and which in consequence, renders the auction liable to be set aside on the ground that the order for sale is a nullity. However, in this

case the 1st defendant had exhibited as encl. 24 an advertisement in "The Star" newspaper dated 5 September 1992 of the sale by auction to be held on 18 September 1992. This to my mind is sufficient notice to the plaintiff. On this ground the plaintiff fails.

Ought There To Have Been A Second Summons For Directions Filed

The final issue taken up by the plaintiff is that the 1st defendant had failed to file a further summons for directions to re-fix the auction date after the original date fixed as 1 September 1992 was taken off. It was the plaintiff's submission that since no second summons for directions was taken out, the auction held on 18 September 1992 was in breach of the 1st defendant's order dated 15 June 1992 which he submitted required the filing of a further summons for directions prior to re-fixing of the auction date. This argument is rejected. The order dated 15 June 1992 states that "if the sale at such reserve price proves abortive the matter should be referred to the SAR for further directions ...". It is clear that the court had in fact on its own volition, even before the scheduled auction date of 1 September 1992 postponed the auction by way of its letter dated 11 August 1992, to 18 September 1992. Whilst the plaintiff has cast reasonable doubts as to the receipt of this letter, I am satisfied that the advertisement in "The Star" earlier alluded to, was sufficient notice to the plaintiff. It is my judgment that there was in this case no breach of the order dated 15 June 1992 as there was no aborting of the sale. Indeed there was no sale on that day at all.

Having considered all other matters raised by the defendant in opposing this application, I am satisfied that the plaintiff has established a case that warrants my granting an order in terms of prayers (a), (b) and (c).

Reported by Ling Hea Hoon